EMPLOYMENT TRIBUNALS

Claimant: Mr Simon Adams

Respondent: Sevco 5075 Ltd t/a FASTSIGNS Hammersmith

HELD AT: London South (by CVP) **ON:** 30-31 March 2023

BEFORE: Employment Judge Hart

REPRESENTATION:

Claimant: Mr Street (solicitor)

Respondent: Mr Pickett (counsel)

JUDGMENT

The Judgment of the Tribunal is that:

1. The claim for unlawful deduction of wages in relation to the underpayment of the claimant's March 2021 salary is stayed.

2. The claim for unlawful deduction of wages in relation to failure to pay commission / bonus payments totalling of £10,880 is dismissed

3. The claim for constructive dismissal is successful, the claimant having resigned in response to the respondent's breach of the implied term of trust and confidence.

REASONS

INTRODUCTION

1. This is a claim for unlawful deduction of wages in relation to non-payment of commission / bonus and breach of contract (constructive dismissal) for notice and holiday pay in relation to the claimant's resignation with immediate effect on 29 March 2021.

2. The claim for unlawful deduction of wages in relation to underpayment of the claimant's salary for March 2021 of £616.98 was stayed to enable the parties to reach a binding settlement, discussions having taken place during the hearing.

THE HEARING

3. The parties and their witnesses attended by CVP. They are all thanked for their assistance and representation during the hearing.

4. It was confirmed at the outset of the hearing that no reasonable adjustments were required by either party.

5. I was provided with a joint agreed hearing bundle of 949 pages, the references to page numbers in this judgment are to the pages in this bundle. In addition to the hearing bundle, the claimant initially wished to rely on a further 16 pages, following discussions between the parties the issue was resolved and the additional pages were not included in the bundle.

6. The claimant had provided a witness statement which he confirmed and gave evidence on his own behalf. Mr Slee, Managing Director, gave evidence on behalf of the respondent. He provided a witness statement which he confirmed subject to the removal of the following paragraphs: 6, 7, 24-31.

7. On completion of the evidence both parties made oral submissions. Judgment was reserved.

CLAIMS / ISSUES

8. The parties agreed that the hearing was to determine liability only.

9. The issues are as set out in the Preliminary Hearing Order dated 30 November 2022 (pg 30).

10. The parties agreed that the claims and issues to be determined by the tribunal were as follows:

Unlawful Deduction of Wages

10.1 Did the respondent make an unauthorised deduction of wages by failing to pay to the claimant commission payments of £10,880?

10.2 If so how much was deducted?

Breach of Contract (notice pay / holiday pay)

10.3 It is not disputed that the claim is arising / was outstanding when claimant's employment ended.

10.4 Was the claimant dismissed?

10.4.1 Did the respondent do the following things?

(a) From June 2020 until March 2021 require the claimant to work whilst he was formally on furlough?

(b) In December 2020 failed to pay to the claimant commission and bonus payments?

10.4.2 Did that breach implied term of trust and confidence?

(a) Did the respondent behave in a way that was calculated or likely to destroy or seriously damaged the trust and confidence between the claimant and respondent; and

(b) did the respondent have reasonable and proper cause for doing so?

10.4.3 In the alternative, in relation to commission and bonus payments, did that breach the claimant's contract of employment with the respondent by not respecting the terms of the claimant's proposal dated 24 January 2020 and / or the commission terms in his employment contract?

10.4.4 Was the breach a fundamental one?

10.4.5 Did the claimant resign in response to the breach?

10.4.6 Did the claimant affirm the contract before resigning?

11. The respondent does not dispute that the claimant was entitled to 3 months' notice and accrued holiday pay for that notice period under his contract of employment, and that he will be entitled to this sum if he was constructively dismissed.

FACTUAL FINDINGS

12. I have only made findings of fact in relation to those matters relevant to the issues to be determined. Where there were facts in dispute I have made findings on the balance of probabilities.

13. The respondent was a signage company, with a franchise from FASTSIGNS UK, which itself was part of FASTSIGNS International. FASTSIGNS UK was a separate legal entity, with no managerial responsibilities or authority over the respondent. The respondent determined its own staffing structure and terms and conditions of employment.

14. The claimant was a senior sales consultant employed by the respondent. The respondent employed a total of nine persons: two Directors and co-owners (Mr Slee and his wife), three sales consultants including the claimant, two design consultants, three installers and one person in marketing (who worked part-time).

15. The claimant was highly recommended to the respondent by Genesis Recruitment Agency. On 24 January 2020 Mr Slee met with the claimant for an interview. Following this meeting the claimant wrote to Mr Slee stating, '*we discussed the basic salary of £50k P.A with a commission structure and vehicle (or car allowance)*' (pg 809-810). He proposed the following commission structure:
'Tiered commission structure from £0 upwards regardless of target
E-mail/ web based and calls converting to sales - 5% of turnover
Resurrection of old legacy clients - 7.5% of turnover
NEW SALES - 10% of turnover'.

16. On 30 January 2020, Mr Slee emailed the claimant with 4 attachments (offer of employment, employee agreement, bonus scheme and personal details form) stating '*I am confident I have best reflected what we agreed and discussed last Friday*'. The email concluded '*Please don't hesitate to contact me if something looks out of place in the documents – happy to walk through any questions'* (pg 133). The offer of employment provided that the claimant was being offered employment *'on the terms discussed, outlined below and detailed in the enclosed employment agreement*' (pg 808). The claimant was asked to sign and return one copy of the documents *'in acceptance of the position offered*'. Again the claimant was invited to contact Mr Slee if he had any queries. I heard no evidence that the claimant did raise any queries. The claimant confirmed that he signed these documents although the versions in the bundle are unsigned. The relevant provisions in these documents are as follows:

    16.1 Offer of Employment (pg 808): *'we operate a Bonus Scheme for Sales Executives which you automatically become eligible to join. This is a discretionary scheme, and subject to the performance of the Centre and all employees. A separate document containing the bonus scheme is attached.*'

    16.2 Employee Agreement (pg 135 -138): This provided an annual salary of £45,000 plus a £5,000 vehicle allowance, minimum notice provision of 3 months, and holiday entitlement of 20 days plus bank holidays and a holiday year running from 1 January to 31 December. In relation to bonus or commission it provided:

    '***Bonus Scheme***
    FASTSIGNS operates a discretionary (non-contractual) Bonus Scheme. Payments from the Scheme are based on the Centre achieving its targeted profits and you achieving any personal targets or objectives as set by FASTSIGNS. The Scheme is subject to change or withdrawal by FASTSIGNS without notice or compensation. If you are to receive a bonus, it will generally be paid to you with your salary at the end of October. In order to receive a payment under the Bonus Scheme, you must be employed by FASTSIGNS and not have tendered your resignation on the date on which bonus payments are made. Full details of the Bonus Scheme currently in operation will be issued to you separately.

***Commission Scheme**:*
You may also be entitled to receive commission payments, in accordance with the policy of the Centre and the terms determined by the Centre from time to time. Any Commission Scheme in operation will be dependent on variables (e.g. sales, targets, profit margins) and therefore may be subject to change, depending on the needs of the business. If eligible, full details will be issued to you, giving information on the current structure, targets and payment details' (pg 136).

17. FASTSIGNS Bonus Scheme for 2020 (pg 810) provided that:

'Objective of the Bonus Scheme
The Bonus Scheme is non-contractual. It is designed to generate a Bonus Pot from which payments, reflecting the Company's whole performance, will be made to the employees responsible for generating sales in designated trading areas. The distribution of the pot may be varied to include additional employees with sales and development responsibilities as the business grows.

The Scheme is dependent on variables (e.g. sales, targets, market conditions, overheads, profit margins, etc.) and therefore may be subject to change according to the needs of the business.
….

Total Bonus
The value of the total Bonus is based on a tiered commission structure from £0 upwards regardless of target. Closed business resulting from email or web based queries (Centre generated leads) 5% of turnover. Sales from resurrected accounts or dormant accounts 7.5% of turnover and Completely New Business brought to FASTSIGNS 10% of turnover.

Bonus Payments
Bonus payments will be paid to you every 6 months or earlier…'

I note that the paragraph headed 'Total Bonus' reflected the claimant's proposal of 24 January 2020. The claimant's understanding was that this paragraph was the 'commission', that it was to be read separately from the bonus provisions and he expected to be paid both. Mr Slee denied this. He stated that the words bonus and commission had been used interchangeably in the pre-contractual negotiations and that they meant the same thing. I note that the claimant, in his resignation letter, acknowledged this, stating that 'sometimes it was referred to a bonus and sometimes as commission' (pg 513). I consider that the bonus scheme reflects this confusion, by referring to commission as the mechanism for calculating the bonus. I accept Mr Slee's evidence that he had used the bonus scheme template provided by his HR consultants and then incorporated the claimant's proposal into this scheme. Mr Slee's understanding of the final document was it created a 'bonus pot' from the profits of the company for the claimant's benefit (since none of the other staff received a bonus). The 'Total Bonus' paragraph sets out how the claimant was to be paid from this pot i.e. using a tiered commission structure rather than targets. Mr Slee denied that he had intended the claimant to be paid commission regardless of what was in the

bonus pot. He referred to the provisions in the Employee Agreement and the Bonus Scheme providing him with safeguards, 'in case something like COVID happened'. The interpretation of these provisions are central to the claimant's case and are considered in my conclusions below.

18. On 3 February 2020 the claimant commenced employment with the respondent.

19. Every month FASTSIGNS International provided a country-based ranking of sales persons in relation to sales made for the year to date (see eg 525). By November 2020 the claimant was ranked number 1 in the UK out of 18 (pg 395). In addition FASTSIGNS UK provided a monthly 'PivotTable' setting out the amount of sales per salesperson (see eg 279).

20. On 26 March 2020 the claimant was placed on full time furlough, along with all but two of the respondent's employees (pg 148-149). His furlough pay was £2,400 pm (gross). The furlough payment was capped and Mr Slee topped up the payment and paid the vehicle allowance, so that the claimant continued to receive the equivalent of his full salary of £4,166.67 (gross). The claimant makes no complaint in relation to this period.

21. In mid-July 2020 the claimant returned to full time working when the COVID restrictions were eased. He worked from home 3 days per week.

22. In September, according to the PivotTable the claimant and Ms Patel (also employed by the respondent) were the top two salespersons in the UK with sales of £33,130 and £31,113 respectively. Mr Slee sent a group chat with a photo of the table highlighting the sales figures for the claimant and Ms Patel with the comment 'Nice work Sales people!!! Now only if the owners can do their fair share!!' (pg 686).

23. In October 2020, Mr Slee says that the claimant was placed back on furlough until the end of December 2020, he accepted in evidence that he may not have asked for the claimant's permission before doing so. The claimant says, and I accept, that in fact Mr Slee did not communicate with him at all. This is because Mr Slee provided no evidence that he at any point informed the claimant, in writing or orally, that he was being placed back onto furlough.

24. The furlough scheme in October 2020 permitted employers to enter into a hybrid arrangement whereby an employee could work part-time with furlough being claimed, at 80% of normal pay, for the non-work periods. This meant that if an employee was placed on 80% furlough they would receive 80% pay for those hours. Mr Slee in his evidence confirmed that it would be illegal to ask a member of staff to work and earn money for hours that was claimed as furlough.

25. There is a dispute between the parties as to the hours that the claimant worked over this period. The claimant says he worked full time between 8am to 5pm, and that he primarily worked from home on telephone sales when not meeting clients or attending installations. Mr Slee says the claimant worked less than 20% of his full-time hours i.e. he was on 80% furlough.

26. The claimant relies on the following as evidence:
    26.1 Text messages and photographs showing that he continued to work from mid-October onwards and therefore was not on furlough (pgs 802-3, 806, 751 and 676-697). However, at their highest, all they demonstrate is that the claimant was working on a limited number of days.
    26.2 His monthly sales figures obtained from the FASTSIGNS International ranking and FASTSIGNS UK Pivot tables of: £1,364 (February 2020); £4,121 (April 2020); £19,338 (May 2020), £20,000 (June 2020), £40,465 (July 2020); £18,205 (August 2020); £33,130 (September 2020); £10,171 (October 2020); £33,483 (November 2020), £12,205 (December 2020), £21,186 (January 2021), £10,713 (February 2020) and £20,200 (March 2021). These suggest that the claimant's sales did not drop by 80% or by any significant amount in October to December 2020. Further November 2020 was his highest performing month.
    26.3 In November he was ranked number 1 and in December number 2 sales person in the UK by FASTSIGNS International (pg 395 and 425).
    26.4 The Sales by Salesperson table (pg 701-749), which records that at least one sale was entered for the claimant on most weekdays between mid-October and mid-December. These tables do not record the amount of hours involved in each sale, or when those hours were worked (sometimes a sale can take several weeks to finalise), but I find that they do record the date the sale was completed and entered onto the system by the claimant.
    26.5 The claimant's travel expenses claims of: 1775 miles for 8 days (July 2020); 912 miles for 5 days (August 2020); 1316 miles for 9 days (September 2020); 1475 miles for 9 days (October 2020); 923 miles for 7 days (November 2020); none for December 2020 or January 2021; 126 miles (1 day) for February 2021 and 173 miles (1 day) for March 2021. The drop in December was due to the claimant being on holiday for part of that month.

27. Mr Slee relies on the following as evidence:
    27.1 His oral evidence that he knew how many hours the claimant worked when he was placed on furlough because he kept a record. He stated that he had not disclosed this document because he 'did not think it was necessary'.
    27.2 His oral evidence that he had access to the claimant's FASTSIGNS email account and that 'very little sales activity' took place over this period. Again no corroborative documentary evidence was disclosed.
    27.3 His oral evidence that 'very little work' was involved in closing a sale and that most of the job involves travelling to meet clients. He stated that the figures in the Sales by Salesperson table and the travel expenses represents a person working at roughly 20% of their normal working hours.
    27.4 The corrected payslips at pg 939 showing that in October 2020 the claimant's pay was a £1693.55 and furlough pay was £1316.13 with a top up of £740 and in November and December the claimant's furlough pay was £2400 per month, with a top up of £1350 per month (pg 939). These payslips were not provided to the claimant at the time, and are

only being relied upon by Mr Slee as evidence that the amount claimed as furlough at the time represented the claimant working 20% of his normal working hours. The difficulty with this position is that the payslips are not evidence of the claimant's actual working hours but what Mr Slee represented to his accountant who produced the payslips. Also due to the cap on furlough payments, the payslips could equally represent the claimant as being on 100% furlough since the amount of £2,4000 is the same as when the claimant was on full-time furlough earlier in the year.

28. On balance I prefer the evidence of the claimant over that of Mr Slee. I accept that the documentary evidence relied on by the claimant presents a partial picture and is not conclusive. However, it shows that the claimant was at work at least part of the time, and whilst it is not conclusive evidence that the claimant was working full-time I do not consider that it supports the respondent's case that the claimant was only working 20% of his hours. In particular, when comparing July–September 2020 and January to March 2021 (when the claimant was working full-time) with October to December 2020 (when the claimant is alleged to be working part-time at 20%), there is no large drop in travel expenses or sales that one would expect to occur with such a large reduction in hours of work.

29. I also consider Mr Slee's evidence as to the hours that the claimant was working to be vague. He did not provide any evidence as to the claimant's working hours in his witness statement, and only stated that the claimant was working 20% of his hours when taken to the Sales by Salesperson tables in supplementary questions. Under cross examination he denied that he had 'plucked the figure of 20% out of thin air', but was unable to explain how it was calculated other than saying this was the 'calculation I came to' and that 'when looking at the amount of work the claimant was doing, that would be right'. Much of Mr Slee's evidence related to how the claimant did not meet his performance expectations, however this is not evidence as to the claimant's hours of work, and in any event is not accepted in the light of his praise of the claimant and Ms Patel's performance in September 2020 (pg 686). Finally I have found that the claimant was not informed that he was on furlough. If he was not informed, then how could he have known that he was only to work only 20% of his usual hours of work. Therefore I find on balance, taking into account all the evidence available to me, that the claimant did continue to work his full hours over this period.

30. On 13 November 2020 the claimant emailed Mr Slee stating, '*Simon I just wanted to work a plan to discuss the commission from this year as we have never tackled it.' (pg 822).* The claimant says that he wrote this email because he expected to be paid commission after 6 months as per the bonus agreement. Mr Slee did not respond to this email. I accept his evidence that he was 'flabbergasted' at the claimant's request because he had had to take out a loan in order to pay staff wages and prevent redundancies due to the impact of COVID.

31. On 2 December 2020 the claimant and Mr Slee had a meeting in the respondent's offices; Mrs Slee was present. Mr Slee makes no mention of this

meeting in his witness statement, but accepted under cross examination that this meeting took place. During this meeting the claimant asked to be paid his bonus / commission and attempted to go through his sales figures (the details of which are not relevant to this claim). Mr Slee refused to discuss the claimant's sales figures and refused to pay the claimant any commission / bonus. The meeting became 'heated' and I accept the claimant's evidence that Mr Slee shouted and swore at his wife who tried to intervene to calm things down. This is consistent with Mr Slee being 'flabbergasted' with the claimant for asking for commission 'in a year of COVID'.

32. On 21 December 2020 the claimant requested payslips for the last 6 months, since the respondent had not been providing payslips over this period.

33. On 31 December 2020 the claimant emailed Mr Slee again asking for his payslips explaining that he wanted to move house and needed them as proof of earnings (pg 823). Following this email Mr Slee telephoned the claimant. The contents of this discussion are disputed. The claimant's evidence was that Mr Slee informed him that he had not given the payslips because he had placed the claimant and others on furlough and he did not want the claimant or his staff to discover this. Mr Slee's evidence was that he informed the claimant that the payslips were 'inaccurate' due to 'CJRS calculations and contributions which had complicated the process', and that because of this the payslips did not match the amounts paid into the claimant's bank account. Mr Slee said he asked the claimant to wait until he could sort the issue out with his accountant, but the claimant 'insisted he urgently needed them right at that moment'. Mr Slee in evidence stated that against his better judgment he sent the inaccurate payslips at very short notice, and the claimant did not bring the matter up again or ask for them to be corrected. Of the two versions, I prefer the claimant's account over that of Mr Slee. His evidence is consistent with Mr Slee's admission in evidence before me that he had claimed furlough when he should not (see below), and the documentary evidence (see 4 January and 8 January 2021 emails). I also note that there is no evidence that the payslips were provided immediately after this conversation, such as to support Mr Slee's evidence that the claimant put him under undue pressure to send inaccurate payslips without allowing him the opportunity to correct them.

34. On 4 January 2021 the claimant emailed Ms Middleton, a solicitor, about the need to show payslips in order to obtain a mortgage (pg 428). In this email he stated that: *'it has come to light that my boss perhaps has furloughed me without telling me but letting me continue to work'*. I find that this email is consistent with the claimant have been told by Mr Slee during the 31 December 2021 conversation that he had placed the claimant on furlough and had not informed the claimant because he wanted him to continue working.

35. On 6 January 2021 the claimant sent a further email to Mr Slee requesting his payslips stating that he was being 'pressed hard' to provide them in order to secure a mortgage (pg 824). This is evidence that the payslips had not yet been sent to the claimant.

36. I find that between 6-8 January Mr Slee sent the claimant his payslips for July to December 2020. The payslips stated that the claimant was on furlough pay of £2,400 per month (gross), but unlike the corrected payslips did not include his top up pay. The claimant accepted that the correct amount had been paid into his bank account. The claimant stated that the payslips were sent after the conversation on the 8 January 2021, however I find that it is more likely that they were sent before because the claimant refers to the incorrect calculation of tax, NI and pension contributions on the 8 January 2021.

37. On 8 January 2021 the claimant set up access to HMRC in an attempt to get information to prove his salary to his solicitors. The same day he pulled out of the house purchase.

38. That afternoon the claimant had a telephone conversation with Mr Slee. What was said during this conversation is in dispute. The claimant's evidence was that prior to the conversation he emailed to himself 'a conversation and discussion plan' setting out the points that he wished to raise with Mr Slee (pg 429-430). This included repeating his objection to Mr Slee's refusal to pay commission on the grounds that it was discretionary and then the following:

'…and after asking for the payslips uncovering what can only be described as a bit of a shock.

Not only have the actions of what you have done are illegal.

I might add have possibly jeopardised me personally moving forward. Risking my future plans with a house and Not paid NI my tax and pension correctly and left me wondering about the morals of the company.

Where do you think we should go from here. ?

Pause and wait

I have given this a great deal of thought since finding out what you have done perhaps not only to me but the rest of the team and I have not slept in days to be honest in worry over losing deposits on our house and also for perceiving I am on more than showing on hmrc…..

If business is effected this year so much to the extent that it requires putting some or all Of us onto furlough then please put this in writing and do so correctly for us to agree up to where the government says that is possible.'

39. Mr Slee disputed the claimant's account contained in this email but provided no evidence as to what was said other than that the claimant asked for his payslips.

40. In contrast the claimant's evidence was clear and consistent. He confirmed, and I accept, that although he did not read the notes in his email verbatim he did raise the issues set out therein. I note that his evidence in his witness statement that he asked to be taken off furlough and that Mr Slee 'do it the right way and not do the way he had as its immoral (sic)' reflects the content of the note. There is no evidence that this note was fabricated by the claimant as appears to be suggested by the respondent. It is clearly contemporaneous, since he sent it to himself an email on 8 January 2021 at 1:10pm. A natural

reading of this email is that this was an aide memoire for what the claimant saw as a difficult conversation, see in particular the reference to "pause", to enable Mr Slee to respond to his concerns. The claimant explained that the reason he wrote himself a script was because of his experience of the conversation with Mr Slee on 2 December 2020 which had resulted in a 'massive argument'. The claimant stated that Mr Slee 'can be unapproachable'. I note that this view is confirmed by another employee, Mr Dodd, who texted the claimant on 3 April 2021 stating, 'Simon has his own way of doing things and can be difficult to work with/for' (pg 534).

41. I also accept the claimant's evidence that during this conversation Mr Slee refused to change the position of the company with regard to claiming furlough when the claimant was working.

42. On 25 March 2021 at 18:56, the claimant emailed Mr Slee requesting payment for expenses amounting to £21.63 and asking for his payslip and queried his tax code. He informed Mr Slee that 'I need to give payslip tomorrow for the rental agreement' (pg 505-506).

43. Mr Slee stated that he then phoned the claimant and again informed him that the payslips were inaccurate since he had 'not yet rectified the situation since the last time he had requested them in early January'. He stated that again the claimant refused to wait until the next morning to enable Mr Slee to provide corrected payslips, and therefore he provided the inaccurate payslips as a favour to the claimant. I note that the evidence provided by Mr Slee is similar to that he provided in relation to the 31 December 2020 telephone conversation. I do not accept Mr Slee's evidence as credible and consider it unlikely in the light of my previous findings, that the claimant would have insisted on being provided with inaccurate payslips. Further Mr Slee has provided no explanation as to why the situation had not been rectified since early January if it could be rectified the next morning.

44. The same evening at 19:50 the claimant received the January and February payslips as photographs from Mr Slee's mobile phone (pg 827-828 and 948). Mr Slee accepts that these represented that the claimant was on furlough when he was not, and that in fact the claimant was working full hours over this period. The claimant responded querying his tax codes and PAYE tax but did not refer to being on furlough (pg 825-826).

45. On 30 March 2021 the claimant resigned with immediate effect (pg 513-514). His resignation letter was copied to Ms Middleton (pg 516). It stated:
    45.1 That the relationship had irretrievably broken down.
    45.2 That this had been the situation for the past 2 months '*since I discovered that you had unlawfully placed me on furlough*'.
    45.3 That when the claimant had joined the respondent he had taken a considerable pay reduction of around £16,000, and that *'to recompense me for this you agreed to pay a commission in addition to basic salary'.* Further that '*There is nothing in the commission scheme that states it is discretionary, although it is sometimes referred to as bonus and*

sometimes as commission. I believe that this is part of my contractual terms of employment'.

45.4 He referred to his sales performance and Mr Slee's conduct and accused Mr Slee of being a bully. I note that this has not been pursued as an issue in this case.

45.5 He then stated as follows: '*All of this paled into the background when I discovered that you had apparently claimed furlough from HMRC for me – without informing me, and whilst still requiring me to continue working as usual. I believe this is an act of fraud and it has irretrievably damaged the trust and confidence I had in you as an employer. I have tried to resolve this informally with you, but when I discovered this week that you were continuing to operate in the same way, this was the last straw. I understand it was not just done to me but many others in the company have also gone through this unknowingly too….. You and I have talked about what I will do with the information I now have, and I have assured you that I will not be a whistle-blower. I'm sure that the facts stated above would not sit comfortably in the public domain and fraudulent misuse of the furlough scheme is something that I understand could lead to criminal charges being brought by HMRC. I just cannot be a part of this, ethically or on any other basis.'*

45.6 The claimant requested payment of sums owed to him under his contract including notice pay, outstanding holiday pay and commission.

45.7 He requested that any response be cc'ed to his solicitor.

46. On 31 March 2021 the claimant reported his concerns to the HMRC (pg 521). The claimant sent a further email to Mr Slee having had no response to his email of the previous day, requesting a response by return (pg 522).

47. On 8 April 2021, Mr Cousin, the respondent's accountant, commented on some of the issues raised in the claimant's resignation letter (pg 537-538). He does not comment on the claimant's accusation that Mr Slee was acting fraudulently on claiming furlough when the claimant was still working. I find that Mr Cousin would not have known if the claimant was working or not when furlough was being claimed, unless informed of this by Mr Slee.

48. On 13 April 2021 the respondent provided a response (pg 539-541). In relation to the two particular points raise by the claimant to be determined by the tribunal:

a. Commission / bonus: The respondent referred to the Employment Agreement and Bonus Scheme, both of which stated that it was discretionary and non-contractual.

b. Working whilst on furlough: The respondent stated, "*this was due to an error of which we can now confirm has been rectified and the HMRC are aware of this"*. It was at this point that the claimant was provided with the corrected payslips (pg 937-940). These payslips still represented that the claimant was on furlough between mid-October to end of December 2020, but no longer represented him as being on furlough between January to March 2021.

Mr Slee further stated that the claimant had not made the respondent aware of his feelings that the relationship had broken down prior to resigning.

49. Following the claimant's resignation, Mr Cousin conducted a review of the payslips of all the respondent's employees and identified a number of inconsistencies and errors in the calculation of furlough pay, which resulted in an agreement on 9 March 2022 with the HMRC to pay the total sum of £9,101.97, representing overpayment and interest (pg 550). In cross examination Mr Slee was asked about these inconsistencies and errors and whether he was saying that he had accidently claimed furlough when he should not have to which he responded, 'could well be'. He was then asked 'could well be or was' to which he responded 'it was'. He then confirmed that he was admitting claiming furlough when he should not have, stating that he was relying on his accountant and that mistakes had been made. He stated that these were inadvertent mistakes not deliberate and that the HMRC was approached and came to an arrangement for the respondent to re-pay the sum of £9,101.97. Mr Slee was unable to provide any details as to how this figure was calculated but confirmed that some of it related to furlough claimed for the claimant.

50. The claimant entered into ACAS Early Conciliation on the 17 June 2021 and received the ACAS certificate on the 1 July 2021. He submitted his claim form on the 13 July 2021. His claim is therefore in time.

THE LAW

Unlawful Deduction of Wages

51. Section 13(1) of the Employment Rights Act 1996 (ERA) provides that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision, or a relevant provision of the workers contract, or the worker has previously signified in writing his agreement or consent to the making of the deduction.

52. The right only arises where the amount of wages paid by an employer to a worker is less than the total amount of the wages 'properly payable' by him to that worker. What is 'properly payable' is that which a worker is legally entitled to under their contract or otherwise: **New Century Cleaning Co v Church** [2000] IRLR 27.

53. The issue in this case is what is 'properly payable' under the contract. Neither party has relied on any caselaw and I consider the contractual principles to be applied in this case are well established and are as follows:

    53.1 The terms of an employment contract may be express agreed, either orally or in writing, or implied because they are obvious, necessary to give 'business efficacy' to the agreement, part of custom and practice of that industry or can be logically deduced from the conduct of the parties.
    53.2 Where the express terms are wholly in writing, then usually communications outside the written agreement is merely background.

This is subject to the parol evidence rule, which may arise if the written agreement does not reflect an earlier oral agreement or the intentions of the parties at the time the contract was entered into i.e. to correct a mistake in the drafting of those written reasons.

53.3 Where the written terms are ambiguous then context may be relevant to the construction of those written terms.

53.4 The general rule is that a term may only be implied if there is no express term.

54. When interpreting an employment contract tribunals should take into account the differential bargaining powers of the parties and consider the true nature of the relationship and not just the intentions of the parties or the wording of any written contract: **AutoClenz Ltd v Belcher** [2011] UKSC 41; **Uber BV & Others v Aslam & Others** [2021] ICR 657, SC.

Constructive dismissal

55. Section 95(1)(c) of the ERA 1996 includes in the definition of dismissal the situation where the employee terminates the contract, with or without notice, *'in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct'.*

56. In the leading Court of Appeal case of **Western Excavating (ECC) Ltd v Sharp** [1978] ICR 221, at 226A-B, Lord Denning stated that:

'If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed'.

57. In **Kaur v Leeds Teaching Hospitals NHS Trust [2019] ICR 1**, paragraph 55, the Court of Appeal (Underhill LJ) provided the following guidance to tribunals of the questions to ask in a normal case of constructive dismissal:

'(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
(2) Has he or she affirmed the contract since that act?
(3) If not, was that act (or omission) by itself a repudiatory breach of contract?
(4) If not, was it nevertheless a part (applying the approach explained in **Omilaju …**) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the term? (If it was, there is no need for any separate consideration of a possible previous affirmation…..)?
(5) Did the employee resign in response (or partly in response) to that breach?'.

Thus if there is a genuine last straw that forms part of a cumulative breach of the implied term of trust and confidence, there is no need for any separate consideration of a possible previous affirmation because the effect of the final act is to revive the right to resign.

58. The approach to be applied to a final straw cases is set out in the Court of Appeal case of **Omilaju v Waltham Forest LBC [2005] ICR 489,** at paragraphs 19-22**.** In particular, Dyson LJ noted that the last act need not itself be a breach of contract, it need not be unreasonable or blameworthy, nor does it need to be of the same character as the earlier acts. However it did need to add something to the breach even if what it added was relatively insignificant. Where the act that tips the employee into resigning is entirely innocuous, a constructive dismissal claim can still succeed, if there was earlier conduct amounting to a fundamental breach, that had not been affirmed and the employee resigned at least partly in response to it, **Williams v The Governing Body of Alderman Davies Church in Wales Primary School [2020] IRLR 589.**

59. The implied term of trust and confidence provided that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example, **Malik v BCCI [1998] AC 20**. This requires tribunals to consider (1) whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and (2) whether it had reasonable and proper cause for doing so**.**

60. Conduct which is calculated or likely to destroy is an 'or' not an 'and'. The legal test requires looking at the circumstances objectively, i.e. from the perspective of a reasonable person in the claimant's position: **Tullett Prebon plc v BGC Brokers LP** [2011] IRLR 420 (CA). The subjective reaction of an employee to his employer's conduct, whilst not determinative of the breach question, can be taken into account when considering whether objectively the employer's conduct is likely to breach the implied term of trust and confidence: **Parsons v Bristol Street Fourth Investments Ltd** (2008) UKEAT/0581/07/DM (Peter Clark J para 20).

61. A breach of the implied term will only occur where there was no 'reasonable and proper cause' for the conduct in question. The burden of proof is on the claimant. Therefore even if the conduct was calculated or likely to destroy / seriously damage the relationship of trust and confidence, there will only be in breach if the employer had no reasonable or proper cause: **Amnesty International v Ahmed** [2009] ICR 1450 (EAT).

62. A breach of the implied term of trust and confidence is a repudiatory breach of contract: **Omilaju** at paragraph 14. This is because the very essence of the breach of the implied term is that it is 'calculated or likely to *destroy or seriously damage* the relationship'.

Causation

63. A repudiatory breach need not be the sole cause or even the principal cause for the resignation provided the employee resigned in response at least in part to the breach: **Nottingham CC v Meikle** [2004] IRLR 703 (CA) at paragraph 33**.**

No affirmation of the breach

64. Mere delay by itself (unaccompanied by any express or implied affirmation) does not constitute affirmation of the contract, although a prolonged delay may be evidence of an implied affirmation: **W E Cox Toner Ltd v Crook** [1981] ICR 823. (This was a case concerning a 7-month delay).

DISCUSSION / CONCLUSIONS

Unlawful Deduction of Wages (bonus / commission payments)

65. The claim for unlawful deduction of wages is in relation to failure to pay 'commission' or 'bonus' payments totalling of £10,880. The issue for me to decide is what did the parties agree at the time.

66. The claimant claims that his proposal made on the 24 January 2020 is capable of being a contractually binding agreement between the parties. I do not agree. It is referred to as a 'proposal' not an agreement. Mr Slee does not accept this proposal but makes a counter-offer on 30 January 2020. This counter offer included a salary of £45,000 instead of the £50,000 requested by the claimant. It also included the terms upon which Mr Slee proposed to pay the bonus / commission. The claimant accepted the counter-offer, so it is this which is contractually binding not proposals made by the claimant prior to that date.

67. In the alternative, the claimant claims that he was contractually entitled to both a discretionary bonus and a non-discretionary commission in accordance with the provisions set out in the Employment Agreement and the Bonus Scheme itself. I do not agree with the claimant's interpretation of these provisions.

68. First, the offer of employment expressly refers to the claimant's entitlement to a 'discretionary' bonus scheme which is 'subject to the performance of the centre and all employees' (pg 808). There is no reference in the offer to payment of a commission in addition to a bonus, and the only scheme referred to and provided to the claimant was the bonus scheme (pg 810). The terms of the offer also make it clear that the respondent was offering a discretionary scheme. The claimant was invited to raise any query and did not do so.

69. Second, the bonus scheme clause in the Employment Agreement described the bonus scheme as 'discretionary (non-contractual)' (pg 136). It goes on to provide that payment was dependent on the respondent achieving its target profit and on the claimant achieving any personal targets and objectives and that the claimant would be provided with the bonus scheme currently in operation. Therefore under this provision the claimant was entitled to a bonus, the terms of which were determined by the scheme. Whereas the commission scheme clause merely stated that the claimant 'may also be entitled to' commission and that 'if eligible' the claimant would be provided with full details. It is therefore a conditional clause. The claimant was not informed that he was entitled to commission in addition to a bonus and he was not provided with details of any commission scheme. Even if the claimant had been entitled to commission, this clause also provided that any commission scheme in

operation was dependent on variables (eg sales, targets and profit margins) and may be subject to change, depending on the needs of the business. Therefore contrary to the claimant's submission, payment of commission was not guaranteed.

70. Third, the title of the bonus scheme ('Bonus Scheme for 2020') suggested that it was provided in accordance with the bonus scheme clause and not the commission scheme clause. Further, in my view the provisions of the scheme are consistent with the bonus clause in the Employee Agreement. It provided that it is non-contractual and stated that the scheme was dependent on variables (sales, targets, market conditions, overheads, profit margins etc) relating to the respondent's business (the centre). This reflects the Employee Agreement clause that stated that payment was dependent on the respondent achieving its target profits. Separately the scheme provided how the bonus, if paid, is to be calculated based on a tiered commission structure. This is consistent with the Employee Agreement clause that payment was dependent on the claimant achieving his 'personal targets or objectives'. Whilst it incorporated the proposal made by the claimant on 24 January 2020, I do not interpret this incorporation as guaranteeing commission payment, and that is not the natural reading of this document. Nor are the provisions in this scheme contradictory as has been suggested by the claimant. The section on 'objective' related to whether the bonus was to be paid at all, whereas the section on 'total bonus' referred to how the bonus was to be calculated. I consider it to be subordinate to the objective, since read naturally all it provides is that if a bonus is paid then it will be done in accordance with the commission structure from £0 upwards regardless of target.

71. Finally, and in any event, the claimant's conduct at the time is inconsistent with his case that he was contractually entitled to a guaranteed commission payment. The bonus scheme stated that the claimant was to be paid every 6 months or earlier, therefore if payment was automatic it should have been paid on or before 3 August 2020. Yet the claimant does not raise the issue with Mr Slee until 13 November 2020. It may be that he was relying on the bonus scheme clause in the Employment Agreement that provided that bonuses would be paid in October, but then that would suggest he was fully aware that payment was non-contractual and discretionary. Further when the claimant did raise the issue with Mr Slee in his email of the 13 November 2020 he does not state that he was owed commission and the amount he was owed, he merely wrote that he wants to discuss commission from this year 'as we have never tackled it' (pg 822). This email undermines his claim that there was a clear contractual agreement that he be paid commission regardless of the ability of the respondent to pay. Therefore this is not a case where the 'reality' of the employment relationship requires me to depart from the written terms of the contract, since the parties do not act in a manner that is contrary to the express terms.

72. Since I have determined that no commission / bonus was payable there can be no unlawful deduction of wages and this claim is dismissed.

Breach of Contract (notice pay / holiday pay)

73. It was not disputed that the claimant's claims arise / were outstanding when the claimant's employment ended. The issue to determine is whether the claimant was constructively dismissed or resigned.

74. The claimant claims that he was constructively dismissed in that he resigned in response to a fundament breach of contract by the respondent. He relies on two breaches:
    (a) Breach of the implied term of trust and confidence and / or express term in relation to the failure to pay bonus and / or commission.
    (b) Breach of the implied term of trust and confidence in that from June 2020 until March 2021 that he was required to work whilst he was formally on furlough.

The commission / bonus issue:

75. For the reasons set out above, I do not find that the failure to pay the claimant a bonus / commission was a breach of any express. Further nor is it a breach of the implied term of trust and confidence since I have found that there was no guaranteed entitlement to payment of commission / bonus.

The furlough issue

76. The claimant's case is that the respondent claimed furlough pay for the period October 2020 to March 2021, when in fact he was at work during this period.

77. The respondent's defence is that:
    (a) Between mid-October and December 2020, the respondent claimed 80% furlough on the basis that the claimant worked 20% of his hours, and that this is reflected on the corrected payslips, therefore there was no wrongdoing.
    (b) Between January to March 2021, the respondent admitted that the claimant was at work full-time but denied that furlough was claimed for this period. The reference to being on furlough on the claimant's payslips was an administrative error and the claimant received corrected payslips in April 2021.

78. The respondent submits that since no actual fraud has taken place, the claimant's claim for constructive dismissal must fail because it is not sufficient for him to subjectively believe that the respondent was involved in wrongdoing.

79. I have considered whether it is appropriate for me to find that the respondent did fraudulently claim furlough payments for one or both of these periods. I have concluded that I do not have enough information to make such a finding. I do not know whether and on what basis the respondent claimed furlough pay from the HMRC for the mid-October to December 2020 period, nor do I know whether furlough pay was also claimed for the period January to March 2021. What I have seen are the payslips which suggest that furlough was claimed, but the respondent's case is that these contained 'administrative errors',

therefore they may not be a correct representation of what was being claimed. I have not been informed what these 'administrative errors' were, what proportion of the £9000 repayment to the HMRC in March 2022 relates to the claimant and what the repayment was in relation to. On the other hand, I do not accept the respondent's submission that I should conclude from the lack of HMRC investigation that the respondent had been cleared of any wrongdoing. I have not been provided with any evidence as to what, if any, investigations the HMRC conducts where an employer has volunteered to pay back the money and the sums involved are relatively small. Further, I have not been informed of what representations the respondent made to the HMRC, which would have informed any HMRC decision not to investigate.

80. I have further considered whether it is necessary for the claimant to prove that the respondent has acted fraudulently in order to rely on a breach of the implied term of trust and confidence, and have concluded that it is not. The test is not whether one of the parties has committed actual wrongdoing but whether without reasonable and proper cause the party has acted in a way that is calculated or likely to breach the contract. In some cases, as in **Malik**, this can arise where the employer is operating the business in a dishonest and corrupt manner. On the facts of that case it was not necessary for the employees to have known of the employer's conduct and the case was put on the basis of assumed facts that the employer had operated its business in that manner. However in many cases it will be difficult for the employee to prove that an employer has operated its business in a dishonest and corrupt manner, and requiring them to do so in my view puts the bar too high. Rather the focus should be on what conduct by the employer is being complained of and whether that conduct, considered objectively, was likely to destroy or seriously damage the relationship of trust and confidence with the claimant, i.e. from the perspective of a reasonable person in the claimant's position. In considering that question I am required to look at all the circumstances including what the employer was representing to the claimant at the time, and whether the claimant's response to those representations was objectively reasonable.

81. Based on my findings of fact, these circumstances are as follows:

81.1 Mr Slee admitted that he had claimed furlough pay for a number of staff including the claimant which he should not have as a result he was required to repay the HMRC approximately £9,000.

81.2 Whether or not the overclaiming of furlough was deliberate or inadvertent the above fact is consistent with the conversation on the 31 December 2020 where Mr Slee informed the claimant that he had been claiming furlough when he should not have and that staff would be unhappy if they found out. Further that the claimant would not be able to rely on his payslips to obtain a mortgage. On receiving this information it was reasonable for the claimant to take the view that Mr Slee was acting unlawfully and that it had a negative impact on him.

81.3 The inaccurate payslips provided to the claimant in January 2021 represented that the claimant had been furloughed from mid-October to

December 2020. I have found that the claimant was not informed that he was on furlough and therefore continued to work his normal hours not 20% as claimed by the respondent. Therefore the payslips represented the claimant as being on furlough when he was not. On receipt of the payslips it was reasonable for the claimant to conclude that Mr Slee was acting fraudulently particularly in the light of the conversation on the 31 December 2020. Mr Slee did not explain what the 'administrative errors' were, such as to enable the claimant to reach a different conclusion.

81.4 I have found as a fact that the claimant had raised his concerns with Mr Slee on 8 January 2021 and that he refused to change.

81.5 Following this conversation Mr Slee did not provide the claimant with his January and February 2021 payslips until he requested them on 25 March 2021. These again represented the claimant as being on furlough when he was not; it being not disputed that over this period the claimant was working his full-time hours. On receipt of the payslips it was again reasonable for the claimant to conclude that Mr Slee was acting fraudulently particularly in the light of the conversations on the 31 December 2020 and 8 January 2021. Again Mr Slee did not explain what the 'administrative errors' were, such as to enable the claimant to reach a different conclusion. Nor did Mr Slee explain why he had not rectified what he called 'administrative errors' for almost 3 months.

82. Mr Slee accepted in evidence that it would be illegal to ask a member of staff to work and earn money for the respondent whilst the respondent was claiming furlough pay for that employee. I find that Mr Slee's conduct, as set out above, was such as to lead a reasonable person in the claimant's position to conclude that Mr Slee was claiming furlough for periods when the claimant was in fact working. If so this was calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.

83. I do not accept that the respondent had reasonable and proper cause for the conduct in question. Mr Slee has not provided a reasonable explanation for what he claims were the 'administrative errors' that lead him to overclaim furlough payments. Further, Mr Slee admitted to the claimant that he deliberately did not provided payslips to the claimant and other employees because he was aware that they would not be happy with him putting them on furlough. He also failed to correct the payslips after the matter was raised with him in January 2021, despite being aware that providing the inaccurate payslips had affected the claimant's chance of obtaining a mortgage. Mr Slee only corrected the payslips after the claimant had resigned and accused him of fraud. Further, even the corrected payslips are incorrect since they continue to represent the claimant as being on furlough between mid-October and December 2020 when he was not.

84. I consider the provision of the January and February 2021 payslips on 25 March 2021, to be itself sufficient to breach the implied term of trust and confidence, since these represent him being on furlough when he was not. In any event, I find that it was also the last straw considered cumulatively with the provision of

the October to December 2020 payslips, and the conversations on 31 December 2020 conversation and 8 January 2021. I do not accept the respondent's submission that the provision of the January and February 2021 payslips was an innocuous act, Mr Slee may not have claimed furlough over this period but he did not inform the claimant of this, but instead conducted himself in such a manner as to lead the claimant to believe that he was continuing to fraudulently claim furlough pay when the claimant was in fact at work.

Was the breach/s fundamental one?

85. Yes, a breach of the implied term of trust and confidence goes to the heart of the contractual relationship.

Did the claimant resign in response to breach?

86. I conclude that the breach of contract was the reason for the claimant's resignation. The claimant resigned without notice within 5 days of being provided with the January and February 2021 payslips and specifically referred to Mr Slee apparently claiming furlough from the HMRC and that he believed that this was an act of fraud in his letter of resignation. It need not be the sole reason for his resignation, it is sufficient that it was an operative reason. In any event I find that it was the main reason. Whilst he was aggrieved at the non-payment of his commission, and raised a number of other complaints in relation to Mr Slee's conduct, he stated that those other matters 'paled into the background' on his discovery that Mr Slee had apparently claimed furlough from the HMRC.

87. I reject the respondent's submission that whether or not the respondent was wrongly claiming furlough made no difference to the claimant because he received the correct salary payment into his bank account. He is entitled to consider that his reputation may be damaged if he is associated with an employer who he reasonably believed, taking into account all the circumstances presented to him at the time, was fraudulently claiming furlough pay. Further it had a real impact on the claimant in that he was unable to use his payslips as proof of salary in order to purchase a property.

Did the claimant affirm the contract before resigning?

88. The claimant has been criticised for not raising a grievance and continuing to work following the 8 January 2021 conversation. I accept the claimant's evidence that the reason was that the respondent was difficult to talk to. Whilst the claimant could have raised his concerns with Mrs Slee, the other director, there are obvious difficulties in raising grievances in a small family run business. In any event, even if the claimant affirmed the earlier breaches by remaining in employment and not raising the issue again after the 8 January 2021, the earlier breaches were resurrected by the second breach or last straw on 25 March 2021.

89. There was only a short delay of 5 days between the final breach of the implied term on 25 March and the claimant's resignation on the 30 March 2021. Mere

delay is not affirmation. The respondent has submitted that the claimant's email response merely queried the tax code and payment amounts, and therefore his silence in relation to the furlough payment over the 5 days meant that this was not a real concern for him. I do not accept that the claimant's response can be taken as affirmation of the contract. I note the letter of resignation was cc'ed to the claimant's solicitor; an accusation of fraud is a serious matter and it is likely that the claimant would have wished to have considered his position and seek legal advice before resigning or raising it with Mr Slee.

Conclusion

90. I therefore conclude that the claimant was constructively dismissed. The respondent does not dispute that the claimant was entitled to 3 months' notice and accrued holiday pay under his contract of employment, and that he will be entitled to this sum if he was constructively dismissed.

Employment Judge Hart

Date: 5 May 2023